9

Office - Supreme Court, U
FILED
NOV 24 1952
HAROLD B. WILLEY, Cl

No. 353

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION,

Appellees.

Appeal from the United States District Court for the Northern District of Illinois.

APPELLANT'S PETITION FOR REHEARING.

NYE F. MOREHOUSE,
P. F. GAULT,
EDGAR VANNEMAN, JR.,
Counsel for Appellant.

Midwest Law Printing Co., DElaware 7-6669-70

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952.

No. 353

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION,

Appellees.

APPELLANT'S PETITION FOR REHEARING.

Appellant prays that this Court grant a rehearing of its order entered November 10, 1952 granting the motions to affirm and affirming the judgment of the United States District Court for the Northern District of Illinois.

REASONS FOR GRANTING REHEARING.

A new development since the submission to this Court upon which the November 10th order was based necessitates this petition. The decision of the United States Court of Appeals for the Tenth Circuit in *Union Pac. R. Co.* v. *Denver & Rio Grande Western R. Co.*, reported in 198 F. 2d 854 (Advance pamphlet No. 7, November 3, 1952), raises a direct conflict with the decision of the lower court herein. This conflict and its far-reaching adverse effect we point out below.

In the instant case the findings of the District Court and the reports of the Commission reflect the undisputed facts that the main line of appellant's railroad lies *between* the main line and other tracks of appellant's competitor, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (called "the Milwaukee"), and the lake front industrial area within the City of Milwaukee known as Jones Island, into which the Milwaukee seeks to extend its line of railroad; and that the appellant since 1928 has been the only railroad having physical connections with or serving the City's Jones Island Harbor Terminal—the industrial district in question. (Appellant's Statement as to Jurisdiction, Appendix A, pp. 18-19.) Notwithstanding these uncontroverted facts, the Commission and the court have held that the proposed construction of trackage by the Milwaukee *would not be* an extension of its railroad *into new territory already served by another carrier.*

The decisions of the Commission and the District Court are based upon these premises:

(a) The proposed construction of a track by the Milwaukee "across the main line tracks and right-of-way" of appellant *would be an extension* of the Milwaukee's line

of railroad, but it *would not be an extension into new territory.* Consequently the prerequisite of a certificate of public convenience and necessity under section 1(18) (49 U.S.C. § 1(18)) could be avoided.

(b) Recognizing that it lacked power on the complaint before it to order the proposed extension if it *would project* the Milwaukee into new territory, the Commission said:

> "While our authority under paragraph (21) of section 1 to require a carrier by railroad to extend its lines does not include extensions into new territory beyond the carrier's undertaking, the extension here into the harbor terminal, within the Milwaukee corporate and switching limits, clearly would be well within the Milwaukee's undertaking and 'holding out.' *Cf. Interstate Commerce Commission* v. *Oregon-Washington R. & Nav. Co.*, 288 U. S. 14, 38-40." (283 I.C.C. 313-4).

The Commission thus conceded the applicability and controlling effect of the *Oregon-Washington* case and acknowledged that it had no power to order the proposed extension of the Milwaukee into the City's harbor terminal if such extension would project the Milwaukee's trackage and service into a new industrial district. But it sought to meet that issue by the above quoted passage, implying that there could be no such thing as a separately and exclusively served industrial area within the greater area comprising the entire city of Milwaukee. (The evidence disclosed a number of separately served industrial areas within the City, as is the case in practically every industrial city of any importance.)

The Commission was forced into this incongruous and unrealistic position because of the ill-considered conclusion in its first Report that it had power to issue its order

under section 1(21) (279 I.C.C. at page 531). The Commission evidently did not then have in mind the fact that it had no authority under that section to order an extension into new territory. Hence in its second Report it sought to patch up this defect in the manner exposed above. In doing so it had to cling to its original idea that this would be an extension of the Milwaukee's line of railroad, else it would have been left without any jurisdiction or authority whatever respecting the proposed track construction which then would have been within the exemption of section 1(22). (49 U.S.C. § 1(22); appellant's Statement as to Jurisdiction, p. 28.) *Texas & P. R. Co.* v. *Gulf, C. & S. F. R. Co.*, 270 U. S. 266, 278. To avoid that pitfall it had resort to the fiction that the Milwaukee had already undertaken to serve Jones Island because it was serving elsewhere in Milwaukee.

In the *Union Pacific* case cited above, the disputed industrial district lay entirely within Salt Lake City and lay *between the parallel main lines of the two competing railroads* and was immediately adjacent to them. These two main lines were only four city blocks apart at the widest point and the disputed district lay in-between. It so happened that the Rio Grande already had some trackage extending into the disputed area and had been rendering service therein while the Union Pacific had never extended its trackage into, or served, the area. Upon new industrial developments taking place in the area the Union Pacific sought to so extend its trackage and it was enjoined from so doing by the suit of the Rio Grande. The Circuit Court, in affirming the District Court's decision, said:

> "The court concluded that the industrial lead track as proposed to be built constituted an extension within the meaning of paragraph (18) of section 1 of the

Transportation Act; and that it did not constitute a spur, industrial, team, switching, or side track, within the meaning of paragraph (22) of the Act." (198 F. 2d, No. 7, at p. 856)

The following further quotation from this Circuit Court decision discloses the direct conflict between its conclusion and that of the Commission and the District Court herein:

"Here, the heart of the industrial area lies between Second and Fourth West Streets. Rio Grande is serving industries within the area by means of spur tracks extending from its main line and from its interchange track. And that company is in position to serve adequately by like means other industries which may come into the area as further development occurs. But industries between Second and Fourth West Streets are not presently reached and served by Union Pacific. It does not have spurs extending from its main line across Second West Street and thence into the area. And it does not reach industries within the area by other trackage. So far as that company is concerned, the proposed trackage will invade new territory not previously or presently served by it; and it will result in loss of revenue to a competing line which is furnishing adequate service to industries already in the area and is prepared to supply like facilities to other industries which may come into the area in the future. The proposed track is an extension, within the meaning of paragraph (18); and its construction is forbidden unless and until a certificate of convenience and necessity has been obtained. *Texas & Pacific Railway Co.* v. *Gulf, Colorado & Santa Fe Railway Co., supra;* and see *Missouri Pacific Railroad Co.* v. *Chicago, Rock Island & Pacific Railroad Co.*, 8 Cir., 41 F. 2d 188, certiorari denied 282 U. S. 866, 51 S. Ct. 74, 75 L. Ed. 765; *Missouri Pacific Railroad Co.* v. *St. Louis Southwestern Railway Co.*, 8 Cir. 73 F. 2d 21." (198 F. 2d, No. 7 at p. 859)

The facts presented in this appeal are very closely analogous to those in the *Union Pacific* case. Here, like the Rio Grande, the appellant is serving industries within the Jones Island area by means of a spur track extending from its main line. It is in position to serve adequately by like means any other industries which might come into the area as further development occurs. The Commission in its first Report noted appellant's present ability to handle "twice as much traffic as it now handles" in the harbor terminal service (279 I.C.C. at page 529). The adequacy of appellant's service was not questioned. The Milwaukee has no spurs or trackage of any kind extending into the Jones Island area. It does not reach or serve the area at all. The proposed trackage, like that of the Union Pacific in the above quoted decision, "will invade new territory not previously or presently served by it." Appellant's resultant loss of revenue in excess of $100,000 per annum was shown to the Commission and the District Court.

Additional facts before the court in this appeal present an obviously stronger case for the enforcement of section 1(18), for the Commission's order requires the extension of the Milwaukee's

> "line of railroad, known as the Bay View spur, now terminating at a point south of East Bay Street in Milwaukee, Wis., across the main line tracks and right-of-way of defendant Chicago and North Western Railway Company to a connection with the municipal harbor terminal of complainant City of Milwaukee east of and adjacent to said right-of-way." (Excerpt from the order of September 27, 1951, Exhibit B, appellant's complaint in the District Court.)

No such crossing of the Rio Grande was involved in the *Union Pacific* case. Here the Commission and the Court had before them the additional factor of a serious opera-

ting hazard to be created by the Milwaukee's proposed slow switching movements across the appellant's main line over which a great many high-speed, streamlined passenger trains are operated daily.

These factors emphasize the importance of the statutory prerequisite that no such extension of a line of railroad shall be undertaken "• • • unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction • • •." (49 U.S.C. § 1 (18).) No such certificate has been applied for or issued in this case. This defect was pointed out to the Commission's Division 3 and to the full Commission and was brushed aside (279 I.C.C. at pp. 530-1; 283 I.C.C. at pp. 313-4). As the District Court filed no opinion we are unable to say what consideration was given to this point. It made no specific finding as to this lack of a certificate under section 1 (18) and merely adopted the Commission's conclusion that it had authority under section 1 (21) (Appellant's Statement as to Jurisdiction, p. 22, conclusion 3).

Thereby the District Court erred by failing to observe that the Commission had given the impression it was following this Court's decision in the *Oregon-Washington* decision while actually pursuing an opposite course.

The recent *Union Pacific* decision in the Seventh Circuit is in direct conflict with the judgment to which this appeal is directed. That decision holds flatly and, as appellant contends, correctly, that track construction of the character here involved "is forbidden unless and until a certificate of public convenience and necessity has been obtained." By reason of this conflict, unless this Court sees fit to exercise its functions of review, the rail carriers of the nation will be required to follow one rule in the

Tenth Circuit, an entirely different rule in the Seventh Circuit, and be left to a choice between the two in other jurisdictions.

It is difficult to visualize a more chaotic and destructive competitive situation than that which would exist wherein the railroads operating in such large industrial cities as Milwaukee, Chicago and Gary would be free to extend their lines anywhere within these cities, at will, and without any certificate from the Commission. This necessarily would follow the final affirmance of the District Court's judgment herein for that judgment has adopted the Commission's theory that the entire territory within the City of Milwaukee is to be considered within the Milwaukee's present "undertaking" and "holding out" although, admittedly, it has never reached or served the City's Harbor Terminal it now seeks to reach and, admittedly, it is not physically possible for it presently to do so. Its railroad must be extended across appellant's "main line tracks and right-of-way" before it can do so.

Concurrently, the railroads serving such cities as Salt Lake, Denver and Cheyenne would be required by the law of the Tenth Circuit to obtain certificates from the Commission before undertaking similar extensions.

Elsewhere, in the Eighth Circuit for example, where the two carriers here involved are engaged in close competition and both serve numerous large industrial communities, there would be uncertainty as to the true meaning and intent of these statutory provisions. They and other railroads throughout other circuits would have to guess at the construction of the statutes to be followed there.

Such a situation is quite incompatible with orderly administration and enforcement of statutes which were de-

signed to provide the nation with an adequate transportation system and specifically

> *"to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers;"* (National Transportation Policy, 54 Stat. 899; Title 49 U. S. Code, note preceding Section 1; Appellants Statement As To Jurisdiction, p. 29)

CONCLUSION.

For the reasons set forth above and in appellant's Statement as to Jurisdiction and its brief opposing the motions to affirm, it is respectfully urged that a rehearing and reconsideration be granted with respect to this Court's order allowing the motions to affirm and that, thereupon, that order be set aside, the motions to affirm be denied, and the Court proceed to review the decision of the United States District Court for the Northern District of Illinois pursuant to the appeal herein.

Respectfully submitted,

(NYE F. MOREHOUSE)

(P. F. GAULT)

(EDGAR VANNEMAN, JR.)
Attorneys for Appellant.

400 W. Madison Street,
Room 1422,
Chicago 6, Illinois.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and is not for delay, and is in accordance with Rule 33 of this Court, as amended October 13, 1947.

.....

(NYE F. MOREHOUSE)

Certificate of Service.

I hereby certify that on this 21st day of November, 1952, I caused copies of the foregoing petition for rehearing and certificate of counsel to be served by mail on counsel for all parties of record.

.....

(NYE F. MOREHOUSE)
Attorney for Appellant.